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JOHN F. DAVIS,

Supreme Court of the United States

No. [redacted] 38

October Term, 1965

ALFRED D. ROSENBLATT
Petitioner

v.

FRANK P. BAER
Respondent

On Petition for Writ of Certiorari to the
Supreme Court of New Hampshire

Respondent's Brief in Opposition

Submitted by /s/ Stanley M. Brown
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Supreme Court of the United States

No. 780

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Petitioner

v.

FRANK P. BAER
Respondent

On Petition for Writ of Certiorari to the
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Respondent's Brief in Opposition

Respondent Frank P. Baer, a private citizen of the State of New Hampshire and of the United States, respectfully represents to the Court that the writ of certiorari sought in this case ought not to issue.

PROCEEDINGS BELOW

This is an action for libel and trespass of the respondent Baer, a private citizen, by the petitioner Rosenblatt, also a private citizen, based upon a newspaper article written by Rosenblatt

which respondent claimed to have been false, scandalous, malicious, defamatory and untrue. Trial was by jury in Belknap County Superior Court in April of 1963, resulting in verdict for Baer in amount of $31,500. Motions to set aside were, after hearing, denied by the Superior Court.

On appeal to the Supreme Court of New Hampshire, the cause was argued on June 2, 1964, and decided *sub nomine, Baer* v. *Rosenblatt,* No. 5211, on October 6, 1964, the order being "Judgment on the verdict." Rosenblatt's motion for rehearing was denied on October 28, 1964.

JURISDICTION OF THIS COURT

The writ is sought under 28 U. S. Code 1257 (3), from the above final judgment of the highest court of the State of New Hampshire, on the claim that a right or privilege was specially set up or claimed below under the Constitution of the United States.

QUESTIONS PRESENTED

Petitioner urges that the writ should issue to review his claim that rights or privileges guaranteed to him under the First and Fourteenth Amendments to the Constitution of the United States were violated by the decision below.

Respondent contends that the writ ought not to issue, because of the provisions of the Seventh, Ninth, and Tenth Amendments to the Constitution of the United States, which require the United States and this Court to recognize his rights, guaranteed under the New Hampshire Constitution, Part 1, Articles 2, 12, 14, and 20, to a remedy for injury to his character, with the facts to be determined by jury according to the common law.

CONCISE STATEMENT OF THE CASE

The petition to this Court is based solely on the premise that the decision in *New York Times Company* v. *Sullivan,* 845 S Ct 710, (March 9, 1964) is an invitation for losing litigants in libel actions to seek a final factual review in this Court. Respon-

dent's position, that such is not the law and should not be the practice, is set forth in our brief below at pages 40-44.

We have here a libel based upon a 1960 newspaper article which falsely defamed respondent—the last in a series of sporadic attacks starting in 1958. Petitioner, in his brief below, *p.* 7, acknowledged that on the evidence, the issue of identification of the respondent, and whether the article imputed wrong-doing to the respondent were properly left for jury determination. Consequently, petitioner has now admitted (after proof was introduced to the triers of fact who inferentially found these facts) the fact of defamation of this respondent.

There was specific proof of damage resulting to the respondent, substantial and actual. This evidence is briefed by respondent below at *pp.* 14-19 and argued at *pp.* 44-46. The Trial Court refused to set aside on the ground of excessiveness. The Supreme Court of New Hampshire reviewed and affirmed the propriety of the verdict of $31,500, pointing out that specific evidence of special damages alone of $16,500 appears in the record. (See opinion in Petition Appendix, *p.* 25 *et seq.*)

In his brief below petitioner twice admitted, *arguendo,* at pages 24 and 32, that the jury in fact found malice to exist in returning its general verdict.

Thus identification, defamation, damage and a finding of malice by the triers of the fact are all beyond dispute here, and the actual issues presented appear to be limited to the procedural handling of the petitioner's defense of qualified privilege, and whether the record contains evidence of malice sufficient to support the jury verdict. On this limited phase of the case, a brief explanation of the facts may be helpful:

Baer had personally handled nearly $1,000,000 in cash—nickels, dimes, quarters and bills—during his employment as supervisor of the Belknap Recreational Area from 1950 through 1959. He collected the money personally and carried it personally to the bank, as was well known to the community. He was terminated by the County Commissioners in June of 1959 after control of this ski area was taken out of their hands effective in September.

Rosenblatt had been sniping at Baer for a year and a half (see Plaintiff's brief below, *pp.* 7-14) and had raised the innuendo in his column that Baer would be embarrassed to answer questions concerning his handling of public funds while he was still employed. After he was terminated without cause stated, Rosenblatt suggested that there may have been "darned good reasons".

A new Commission took over control of the area in September of 1959 and replaced Baer with a new supervisor, Warner.

On January 28, 1960, Rosenblatt wrote, and published on January 29, that he had been investigating, was thunderstruck at what he had learned: "the difference in cash income simply fantastic, almost unbelievable", that the area was "doing literally hundreds of per cent BETTER than last year". Then, saying weather factors could not explain the difference, he posed the question:

"What happened to all the money last year? and every other year?"

His readers "got the message" loud and clear: like wildfire it was interpreted as indicating that Baer had been stealing the funds. Not only were all of the adults discussing it, its impact was even felt on the playground at the public school where Baer's granddaughter was taunted by other children: "They are calling my grandpa and my daddy a thief. It said so in the paper." (See brief below, *pp.* 14-17.)

Rosenblatt testified that he intended to compare the period in 1959-1960 of Warner's control (September 1959—January 1960) with the same period in the prior year; he also said (trying to change his position) that he had in mind only the ski season within that period. He wrote the piece on January 28, so obviously had access to no information as to cash receipts subsequent to that date. The actual facts were:

In Baer's last year, in the period September through January, he deposited $65,471.17, of which $52,756.00 was operating revenue: in the following year Warner's deposits in the same period were $53,396.00. During the ski season only in Baer's last year through January, Baer's receipts were $49,775.49; Warner's

receipts to January 29, 1960, were $49,932.59. Thus on the facts there was no material change in the cash income being experienced after Warner replaced Baer up to January 29, 1960. The record is replete with evidence that neither on a gross nor on a net basis was there any remarkable change in receipts or profits worthy of public reporting or comment.

There was no factual basis for the writing. The sources Rosenblatt claimed gave him such information denied that they had done so. No such comparative data even existed. It is for this deliberate prevarication that petitioner claims a constitutiinal privilege—defamation published "Out of My Head".

ARGUMENT

This Court in *New York Times, supra,* announced a new rule for the disposition in trial courts of claims for libel brought by public officials (whatever that may mean in individual cases) against critics of their official conduct (whatever that may mean in individual cases). The new requirement for the cases to which *New York Times* applies is merely that the defamatory statement be made "with actual malice—that is, with knowledge that it was false or with a reckless disregard of whether it was false or not".

In announcing this rule, the Court approved "an oft-cited statement of a like rule, which has been adopted by a number of state courts"—including, by reference in footnote 20, the Supreme Court of New Hampshire: "And see *Chagnon* v. *Union Leader Corp.,* 103 N. H. 426, 438, 174 A.2d 825, 833 (1961)". Certiorari was denied in *Chagnon,* 369 U. S. 830, 7 L.ed 795, 82 S Ct 846.

The *Chagnon* rule thus specifically referred to is:

> "Even though a defendant cannot justify the publication because it can be found to be untrue, he may excuse it by showing it was privileged. A conditional privilege, which is what is claimed here, is established if the facts, although untrue, were published on a lawful occasion, in

> good faith, for a justifiable purpose, and with a belief, founded on reasonable grounds of its truth [citations]. However, if a defamatory statement is made with actual malice, it cannot be excused as privileged [citations].
>
> "The Trial Court charged the jury as to what constitutes malice in the following words: 'by malice I mean not only ill will, evil motive or intention to injure but also wanton disregard of the rights of others and the consequences likely to follow'. We are of the opinion that this was a proper statement of the applicable law."

The instant case was handled procedurally with respect to the defense of privilege precisely as was the *Chagnon* case. Consequently, the writ ought not to issue.

Petitioner argues, we think, that under the *New York Times* rule he is entitled to have the trial court rule at the outset of trial and charge as a matter of fact that any false defamatory writing of or concerning a government activity is privileged, leaving as the only issue of fact whether there was actual malice.

We believe, on the contrary, that *New York Times,* read together with the cases cited as illustrative of a similar rule and *Garrison* v. *Louisiana,* U. S. , 13 L.ed (adv) 125, properly leaves with the State courts the procedural problem of whether a "lawful occasion" or a "conditional privilege" is made out *independently of the issue of malice,* and is then destroyed by proof of malice, or whether *absence of malice is a necessary part of establishing the defense of qualified privilege.* Under the New Hampshire rule, since malice is an issue of fact (it is not presumed), once malice is claimed and some evidence of malice is introduced, both issues—malice and privilege—become issues for the trier of the fact under *Chagnon* instructions.

In this case, actual malice was pleaded, actual malice was claimed in opening, and evidence of actual malice was introduced in plaintiff's case. Thus, since plaintiff's evidence was first received, a factual issue on malice was already in the case before evidence was received on which the claim of qualified privilege was based. And unless the Court is to invade the constitutional

province of the jury, under such circumstances both malice and privilege become factual issues. We invite to the Court's attention our discussion of the New Hampshire cases on this point, in our brief below, at pages 25-26.

That the record below contains evidence of actual malice has already been decided, (1) by the Trial Court who submitted the issue to the jury, (2) by the jury to whose determination of the fact respondent is entitled under N. H. CONSTITUTION, Part 1, Article 20 in an action for injury to his character, *Id.* Art. 14, and (3) on review by the Supreme Court of New Hampshire.

We have briefed that evidence below in our brief at *pp.* 29-38. Our Supreme Court refers to the same evidence generally as proof of actual malice. (See opinion in Petition Appendix, *pp.* 19-22.) Whether the test be that of "substantial evidence on the record", "sufficient evidence", or any other test appropriate to a civil case, we submit that the finding, verdict and judgment below are constitutionally sound.

Rosenblatt, in writing and publishing this libel used a calculated falsehood, *at least* with reckless disregard of whether it was true or false, for the malicious purpose of insinuating that Baer was dishonest. We say, on the entire record, including Rosenblatt's own testimony, that the jury was entitled to conclude that his published statements of fact concerning the non-existant but purportedly "fantastic" increase in cash income were *knowingly false* because he made them up himself. They saw him. They heard him knowingly lie to them in efforts to deny his malice. They heard his "sources" deny that they gave him the supporting information which he ascribed to them. They had before them uncontradicted and unimpeached evidence that *no data existed* on January 28 or 29, 1960, that would have suggested such a factual situation. *Thus deliberate prefabrication for the purpose of publishing a provocative defamatory insinuation is an almost compelled finding,* once the jurors decided not to believe Rosenblatt's protestations of honest error. Credibility became the crucial question on the issue of whether this defamation resulted from honest inaccuracy or the use of calculated falsehood, and the issue is foreclosed by the determination of the triers of the fact. The weighing of the evidence was for the jury under the

New Hampshire Constitution, competent evidence having been laid before them. There is no constitutional immunity for such conduct. *Garrison* v. *Louisiana, supra.*

In what we have argued above, we have assumed that this Court's decision in *New York Times* has some application here. In fact, we do not believe this case falls within the area toward which *New York Times* is directed because Baer was not a public official. He was a private citizen at the time of the libel and at the time of instituting the action. He had never been a "public official", his prior position being merely that of an employee of the Belknap County Commissioners (See Brief below, *pp.* 41, 42).

CONCLUSION

It seems abundantly clear to members of the trial bar that under the doctrine of *New York Times* defense counsel henceforth will routinely claim violation of rights guaranteed under the First and Fourteenth Amendments to the Constitution of the United States in an effort to get an independent constitutional review of the facts of the case by this Court in all libel cases where privilege is claimed. This is such a petition. The writ ought not to issue.

Respectfully submitted,

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